

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MICHAEL T. MCGEE,

Petitioner,

v.

Civil Action No. 5:16CV102
(Criminal Action No. 5:13CR23
(STAMP)

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE

I. Background

The pro se petitioner, Michael T. McGee, filed a motion (ECF No. 1) under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. In that motion, the petitioner claims that he was denied due process, asserts claims of ineffective assistance of counsel, and claims that the Career Offender's Guideline Residual Clause is unconstitutionally vague and that the Court violated the rule in Descamps v. United States 133 S.Ct. 2276 (2013). ECF No. 6 at 3, 4, 7.

Magistrate Judge Robert W. Trumble made a preliminary review of the motion and determined that summary dismissal was not warranted and entered an order directing the respondent to file an answer, motion or other responsive pleading. Respondent filed its response and petitioner filed his reply. Magistrate Judge Trumble then issued a report and recommendation (ECF No. 6) without holding an evidentiary hearing, and recommended "that the District Judge

deny and dismiss Petitioner's motion with prejudice." ECF No. 6 at 1.

II. Applicable Law

As there were no objections filed to the magistrate judge's recommendation, the findings and recommendation will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

III. Discussion

This Court, after a review for clear error, finds no clear error in the determinations of the magistrate judge and adopts and affirms the report and recommendation (ECF No. 6) in its entirety.

This Court finds that the magistrate judge correctly found no merit in petitioner's claim that he was denied Due Process when he was arrested in Ohio and transported to West Virginia. The magistrate judge found that petitioner was properly transported from Steubenville Ohio, where he was arrested, to the Northern District of West Virginia on the day of his arrest for his initial appearance in front of Magistrate Judge James E. Seibert in accordance with Rule 5(c)(2)(B)(ii) of the Federal Rules of Criminal Procedure. ECF. No. 6 at 3-4.

The magistrate judge also correctly found no merit in petitioner's claims of ineffective assistance of counsel. ECF No. 6 at 4-7. For ineffective assistance of counsel claims, the United States Supreme Court has set forth a two-pronged test for courts to

use when determining whether a convicted defendant's claim of ineffective assistance of counsel warrants reversal of the conviction. Strickland v. Washington, 466 U.S. 668, 687 (1984). First, "the defendant must show that counsel's performance was deficient." Id. Second, "the defendant must show that the deficient performance prejudiced the defense." Id. These two prongs are commonly referred to as the "performance" and "prejudice" prongs. Fields v. Att'y Gen. of Md., 956 F.2d 1290, 1297 (4th Cir. 1992).

This Court finds that under Strickland, the magistrate judge correctly analyzed the petitioner's claims that trial counsel was per se ineffective, that counsel was ineffective due to a failure to investigate and suppress evidence, and that counsel was ineffective by failing to raise an issue on direct appeal.

This Court also finds that the magistrate judge correctly found that no analysis of the Descamps ruling is required in this matter, and that petitioner is a career offender without consideration of his conviction for aggravated robbery given his two previous controlled substance felony convictions, which unambiguously qualify him as a career offender under U.S.S.G. § 4B1.1. ECF No. 6 at 9.

Finally, this Court finds that the petitioner was properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action would result in a

waiver of appellate rights. Because the petitioner has failed to object, he has waived his right to seek appellate review of this matter. See Wright v. Collins, 766 F.2d 841, 844-45 (4th Cir. 1985).

This Court finds no error in the above determinations of the magistrate judge and thus upholds his recommendation.

IV. Conclusion

Accordingly, after a review for clear error, the report and recommendation of the magistrate judge (ECF Nos. 6/163) is AFFIRMED and ADOPTED in its entirety. The petitioner's motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 (ECF Nos. 1/146) is DENIED. It is further ORDERED that this case be DISMISSED WITH PREJUDICE and STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the pro se petitioner by certified mail to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: September 21, 2017

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE